Supreme Court, U.S.
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No.

In the Supreme Court of the United States

IN RE NEW ORLEANS TRAIN CAR LEAKAGE FIRE LITIGATION

NOVA CHEMICALS INC.,

PETITIONER,

v.

LEONARD ADAMS, MICHAEL NOAL, VIRGINIA PHILLIPS, DEBRA BLACK, ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

PETITION FOR A WRIT OF CERTIORARI

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105 pp

QUESTIONS PRESENTED

(1) Whether Louisiana's refusal to permit a purchaser of hazardous materials to delegate the responsibility for safe interstate transport to a qualified shipper violates and is preempted by the federal statutes and regulations governing hazardous materials transportation.

(2) Whether Louisiana's refusal to permit such delegation of responsibility imposes an excessive and unconstitutional burden on interstate commerce.

PARTIES TO THE PROCEEDING

Petitioner NOVA Chemicals Inc. is the corporate successor in interest to Polysar, the company involved in the underlying events. Because prior rulings speak of "Polysar," petitioner refers to itself as "Polysar" in this petition.

Respondents in this case are Leonard Adams, Michael Noal, Virginia Phillips and Debra Black, who represent a class of approximately 8,000 individuals.

AMF-BRD, Inc. is the only other remaining defendant in the underlying case.

RULE 29.6 STATEMENT

Petitioner's ultimate parent corporation is NOVA Chemicals Corporation, an Alberta corporation that is publicly held and traded on the New York and Toronto Stock Exchanges.

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PETITION FOR A WRIT OF CERTIORARI

NOVA Chemicals Inc. (referred to herein as "Polysar") petitions for a writ of certiorari to review the judgment of the Louisiana Fourth Circuit Court of Appeal.

OPINIONS BELOW

The opinion of the Louisiana Fourth Circuit Court of Appeal (Pet. App. 1a-57a) is reported at 795 So. 2d 364. The order denying rehearing (*id.* at 58a) is reported at 794 So. 2d 956. The order of the Louisiana Supreme Court denying certiorari or review (*id.* at 59a) is reported at 827 So. 2d 411.

JURISDICTION

The Louisiana Fourth Circuit Court of Appeal entered judgment on June 27, 2001, and denied the application for rehearing on August 1, 2001. The Louisiana Supreme Court denied certiorari or review on October 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. 60a-65a) reproduces the text of the Commerce Clause, U.S. Const. Art. I, Section 8, cl. 3, and the provisions of the Hazardous Materials Transportation Act, 49 App. U.S.C. §§ 1801 *et seq.* (1990), and the Hazardous Materials Transportation Uniform Safety Act of 1990, 49 U.S.C. § 5101 *et seq.*, involved in this case.

STATEMENT OF THE CASE

1. Polysar manufactured latex at a plant in Chattanooga, Tennessee. In 1987, Polysar purchased a quantity of the chemical butadiene from a supplier in Portugal and contracted for its delivery by Mitsui & Co., U.S.A. ("Mitsui"), an experienced commodities shipper. Mitsui agreed to accept the chemical from an oceangoing vessel at a port facility in Goodhope, Louisiana and to perform all the

necessary functions to safely store, load, and ship the cargo by rail to Polysar in Tennessee. (Tr. 2452-59, 2515-18). Mitsui's agent GATX Terminals ("GATX"), which leased and managed the port facility for Mitsui, loaded the butadiene into rail tank cars leased by Mitsui. (Tr. 3031-32). GATX inspected the tank cars and certified compliance with all pertinent federal regulations governing transportation of hazardous materials. GATX acknowledged that it (as agent for Mitsui) was the party that "offer[ed]" the butadiene "for transportation in commerce," under the terms of those federal regulations. (Pls. Exs. 61, 72).

Consistent with ordinary commercial practice, Polysar did not send its own employees to Mitsui's Goodhope terminal and did not participate in the loading of the butadiene or the selection or inspection of the tank cars. (Tr. 2473-74, 3169, 3073-79). Mitsui and GATX are qualified experts in the handling of hazardous cargo such as butadiene. Until this incident, Mitsui had safely shipped butadiene and other hazardous materials thousands of times to major companies throughout the country, including to Polysar for 12 years. (Tr. 2712, 3168, 3179).

As a result of a defective gasket, one of the rail tank cars loaded by Mitsui and GATX began leaking butadiene and caught fire at a major railroad interchange in New Orleans, Louisiana. Pet. App. 2a.

2. That fire ultimately resulted in litigation by a class of approximately 8,000 plaintiffs. After a trial on the claims of twenty selected plaintiffs, the jury returned a verdict awarding approximately $2 million in compensatory damages relating to an alleged increase in cancer risk, as well as for depression, anxiety, and fear that the plaintiffs suffered because of the fire. Pet. App. 39a, 42a-43a. The jury allocated fault among nine defendants. Polysar was assessed a 5% share of the compensatory damages. The jury also awarded punitive damages in excess of $3 billion

against defendants other than Polysar. The trial court subsequently reduced the compensatory damages to approximately $700,000 and the punitive damages to approximately $850 million. Pet. App. 5a-7a.

On appeal, Polysar argued that the jury's liability verdict against it must be set aside because Polysar had no duty personally to inspect the tank cars loaded by GATX and Mitsui under the federal hazardous materials statutes and the regulations promulgated by the United States Department of Transportation ("DOT"), which preempt any inconsistent requirements under state law. Polysar pointed out that, under DOT's "functional" test for determining the "shipper" or "offer[or]" of hazardous materials, Mitsui and GATX were the parties responsible for compliance with the federal regulations in this instance. Polysar also explained that the regulations, as interpreted and applied by DOT, explicitly permitted Polysar to allocate these regulatory duties to Mitsui and GATX by contract and commercial practice—as a matter of federal law.

The Louisiana Fourth Circuit Court of Appeal nonetheless held that Polysar retained various inspection and other (undefined) duties which, as a matter of Louisiana tort law, could not be delegated to Mitsui and GATX. Although its decision was framed partly in terms of the federal regulations, the court made almost no effort to interpret those regulations or engage the interpretive guidance provided by DOT. The Louisiana court wrote that the federal regulations apply not only to a "'shipper' (*whatever a 'shipper' is*)," but also to any "'person [who] may offer or accept a hazardous material for transportation in commerce,'" noting that the latter "*seems* as applicable to Polysar, whose butadiene was being transported, as it is to Mitsui." Pet. App. 52a (emphasis added) (alteration in original). The court did not mention or apply DOT's functional test for determining the "shipper" or "offer[or]"

subject to the regulations. The court instead considered it sufficient that Polysar was the title owner of the cargo, with the theoretical right, as title owner, to direct and oversee its transportation. The court stated that because the duties it imposed on Polysar, as title owner, were "importan[t] . . . to the public safety," and therefore non-delegable as a matter of State law, "whether Mitsui is an 'independent contractor' to Polysar is of no moment." *Id.*

On August 1, 2001, the Fourth Circuit denied Polysar's application for rehearing. Pet. App. 58a. The Louisiana Supreme Court denied certiorari on October 14, 2002. *Id.* at 59a.

REASONS FOR GRANTING THE PETITION

In the 1975 Hazardous Materials Transportation Act, 49 App. U.S.C. §§ 1801 *et seq.* (1990) ("HMTA"), Congress recognized the importance of a comprehensive and uniform federal law governing the transportation of hazardous materials in the United States. Acting under authority delegated by Congress, DOT promulgated extensive Hazardous Materials Regulations ("HMR" or "DOT regulations"), which impose various packaging, inspection and certification duties on shippers and carriers of hazardous materials. The HMTA expressly preempts any State law requirements which are inconsistent with that statute and its implementing regulations. 49 App. U.S.C. § 1811 (1990).

Under the regulations, binding formal guidance from DOT, and longstanding commercial practice, those regulatory duties are generally performed by independent shipping companies experienced in the handling of hazardous materials. DOT's pragmatic test for determining the shipper (or "offeror") of hazardous materials imposes regulatory compliance duties on the party that, by contract and/or ordinary commercial practice, actually performs the

relevant regulated function—such as packaging, loading and unloading, and transporting hazardous materials.

In this case, the Louisiana Fourth Circuit Court of Appeal held that an owner of hazardous materials transported in interstate commerce from, through, or to Louisiana is personally liable for the safe handling and transport of those materials *regardless of whether the owner has arranged for the shipment to be made by a qualified independent contractor.* Although the court gave lip service to the hazardous materials regulations promulgated by DOT, it utterly ignored DOT's dictate that the regulatory obligations for safe packing, handling, and transport fall on the parties that, pursuant to contract or custom, actually carry out those functions. In direct conflict with DOT's "functional" standard, the court held that an owner of hazardous materials cannot delegate to qualified independent transportation contractors the legal responsibility for the functions they perform.

The practical consequence of the court's ruling is that purchasers of industrial chemicals or other hazardous materials located anywhere in the United States must now send an employee representative to second-guess the shipper's inspection and packaging of any cargo originating from, or merely passing through, the State of Louisiana. The rule of law adopted by Louisiana is a prescription for confusion, delay, and conflict between cargo owners and hazardous materials shippers—who remain responsible for regulatory compliance as a matter of *federal* law. That rule is expressly preempted by the HMTA, which preempts any State requirements that are inconsistent with those imposed by that statute and DOT's implementing regulations. Because it imposes a severe and disuniform burden on the transportation of hazardous materials in interstate commerce, without any substantial local benefit, it is also squarely foreclosed by the dormant Commerce Clause.

The potential costs and effects of the court's ruling are staggering. The Office of Hazardous Materials Safety estimates the number of hazardous materials shipments in the United States at approximately 800,000 daily or in excess of 300 million per year, totaling 3.2 billion tons.[1] Moreover, a disproportionate share of those shipments move through the State of Louisiana, home to the world's busiest port complex and to two of the four largest railroad junctions handling hazardous materials shipments nationwide.[2] Without this Court's immediate intervention, this decision will therefore have dramatic, deleterious consequences for the efficiency and safety of our Nation's transportation system. Polysar respectfully believes that the starkness of the Louisiana court's error and the national importance of the decision warrant certiorari, and that this would be an appropriate candidate for summary reversal. If this Court is uncertain whether certiorari is warranted, Polysar also respectfully suggests that it would be appropriate to request the views of the Solicitor General.

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[1] *Departmentwide Program Evaluation of the Hazardous Materials Transportation Programs* at i, v (DOT March 2000) (referred to herein as "DOT 2000 Report").

[2] The data is contained in the Federal Multimodal Database-The Commodity Transportation Survey, maintained by the Bureau of the Census cited by U.S. Congress, Office of Technology Assessment, *Transportation of Hazardous Materials*, OPA-SET-304 (Washington, DC: U.S. Government Printing Office, July 1986) (referred to herein as the "OTA Report").

I. THE NON-DELEGABLE STATE LAW OBLIGATIONS IMPOSED ON PURCHASERS OF HAZARDOUS MATERIALS BY LOUISIANA ARE PREEMPTED BY THE HMTA AND DOT REGULATIONS.

A. Congress Enacted The HMTA To Create A Consistent, Uniform Body Of Federal Law Governing The Transportation Of Hazardous Materials.

Congress enacted the HMTA in 1975[3] "to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." The HMTA drew "the Federal Government's ... fragmented regulatory and enforcement power over the movement of hazardous materials in commerce into *one consolidated and coordinated effort* under the direction of the Secretary of Transportation." *City of N.Y. v. United States Dep't of Transp.*, 715 F.2d 732, 741 (2d Cir. 1983) (quoting S. Rep. No. 93-1192, at 1 (1974)) (emphasis added), *cert. denied*, 465 U.S. 1055 (1984). The objective was "'to replace a patchwork of state and federal laws and regulations' concerning the transportation of hazardous materials 'with a scheme of uniform, national regulations.'" *Chlorine Inst. v. Cal. Highway Patrol*, 29 F.3d 495, 496 (9th Cir. 1994) (quoting *S. Pac. Transp. Co. v. Pub. Serv. Comm'n*, 909 F.2d 352, 353 (9th Cir. 1990)).[4]

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[3] Pub. L. No. 93-633, 88 Stat. 2156 (1975).

[4] *See also, e.g., Colo. Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1581 (10th Cir. 1991); *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1112 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986); *Nat'l Tank Truck Car Carriers, Inc. v. Burke*, 608 F.2d 819, 824 (1st Cir. 1979).

When Congress amended and recodified the HMTA in the Hazardous Materials Transportation Uniform Safety Act of 1990, 49 U.S.C. § 5101 *et seq.* ("HMTUSA"), it reiterated the importance of clear, consistent and uniform standards governing the transportation of hazardous materials. Among other things, Congress found that:

> (3) many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements,
>
> (4) because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable,
>
> (5) in order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable.

Pub. L. No. 101-615, 104 Stat. 3244, 3245, *quoted in* 49 App. U.S.C. § 1801 note (1993) (Congressional Finding: 1990) (congressional declaration of policy); *see also Colo. Pub. Utils. Comm'n*, 951 F.2d at 1580-81 (collecting and summarizing legislative history).

B. Federal Hazardous Materials Regulations Impose Compliance Obligations On the Party Actually Performing Shipping "Functions."

Under authority delegated to it under the HMTA, DOT promulgated comprehensive regulations governing the transportation of hazardous materials, *see* 49 C.F.R. pts. 171-79.[5] These regulations impose packaging, inspection, certification and other duties on parties involved in the transportation process—variously described as shippers, carriers, and persons who "offer or accept a hazardous material for transportation in commerce." *E.g.*, 49 C.F.R. § 171.2(a).

Although that last formulation might seem quite broad at first blush, it is actually a term of art with a specific regulatory meaning. DOT has promulgated a formal interpretation clarifying that the "offer[or]" of hazardous materials under the regulations is to be determined on a practical, "functional" basis. Under DOT's functional approach, the "person who performs, attempts to perform, or, under the circumstances involved, is contractually or otherwise responsible to perform, any of the functions assigned by the regulations to the offeror" becomes the party responsible for compliance with the regulatory requirements imposed on offerors. Notice No. 90-2, Formal Interpretation of Regulations Issued Under the HMTA, 55 Fed. Reg. 6758 (Feb. 26, 1990). Determining who will be treated as the "functional" offeror under the regulations "require[s] consideration of all relevant facts, including ownership of the materials, functions performed or undertaken by the parties, past practices of the parties, and contractual arrangements among the parties." *Id.*

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[5] Authority for the current regulations derives from the statute as recodified by the HMTUSA.

As DOT's discussion and the accompanying examples make clear, the duties imposed on "offer[ors]" by the regulations may be delegated by contract and commercial practice. A purchaser of hazardous materials does not "offer or accept a hazardous material for transportation" within the meaning of the regulations unless it is responsible for performing the regulated *functions* (i.e., packaging, loading, certification) in question. Mere ownership of title to the cargo at the time those functions are performed *does not* transform a purchaser of hazardous materials into an "offer[or]" under the federal regulations. *Id.*

DOT's formal interpretation of its own regulations is entitled to considerable deference. *See, e.g., Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 158 n.13 (1982) (deference to administrative construction of a regulation is "clearly in order") (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). As this Court explained in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), when construing the National Traffic and Motor Vehicle Safety Act,

> Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements .... In these circumstances, the agency's own views should make a difference.

529 U.S. at 883 (citations omitted). The Louisiana Court of Appeal was similarly required to defer to DOT's functional responsibilities test when determining whether Polysar was an "offer[or]" of hazardous materials under DOT's own regulations.

C. The Duplicative Obligations Imposed On Owners of Hazardous Materials By Louisiana Are Preempted By The HMTA And DOT Regulations.

1. Congress Sought To Preempt All State Law Requirements That Would Undermine The Consistency And Uniformity Sought By Federal Hazardous Materials Regulation.

To promote the stated goals and purposes of the HMTA, Congress sought to preempt the field of interstate transportation of hazardous material in all but very limited cases. 49 App. U.S.C. § 1811 (1990); *see City of N.Y.*, 715 F.2d at 740 (preemption provision under HMTA has a "broad sweep"). Congress inserted express preemption language into the HMTA "in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous material transportation." S. Rep. No. 93-1192, at 37 (1974). Moreover, DOT consistently has opined and recognized that "the comprehensiveness of the HMR issued to implement the HMTA, severely restricts the scope of historically permissible state and local activity." *See, e.g.*, Inconsistency Ruling No. IR-31, 55 Fed. Reg. 25,572 (June 21, 1990); Notice No. 89-3, 54 Fed. Reg. 26,710 (June 23, 1989).

The HMTA preemption provision in effect at the time of this accident expressly preempted "[a]ny requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or a regulation issued under this chapter." 49 App. U.S.C. § 1811 (1990).[6] By regulation, DOT set forth two criteria it would

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[6] Agency regulations, properly promulgated pursuant to congressional authority, "have the force and effect of law," *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979), and therefore the same preemptive effect as federal statutes. *See, e.g., de la Cuesta*, 458 U.S. at 153.

consider in determining whether a non-federal requirement was "inconsistent" with the HMTA or the regulations: (1) whether compliance with both the non-federal and federal requirement is possible, and (2) the extent to which the non-federal requirement is an obstacle to the accomplishment and execution of the HMTA and the regulations issued thereunder. 49 C.F.R. § 107.209(c)(1), (2) (1987). These criteria mirror this Court's established standards for determining when a federal statute impliedly preempts state law. *See, e.g., Hillsborough County v. Automated Med. Labs*, 471 U.S. 707, 713 (1985) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *Geier v. Am. Honda Motor Co.*, 529 U.S. at 873-74; *Sprietsma v. Mercury Marine*, 123 S. Ct. 518, 527 (2002). Legal "requirements" in this context include obligations imposed by judicial decision under state tort law. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (holding that regulations promulgated by DOT under the Federal Railroad Safety Act, 49 U.S.C. § 20106, preempt state tort actions).[7]

This Court has explained that the relevant inquiry under this "obstacle" test for implied preemption is whether State law poses an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County*, 471 U.S. at 713. As the lower courts

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[7] Although the specific HMTA preemption provision applicable here was amended and recodified by the HMTUSA, the substantive standard has not changed. When it passed the HMTUSA in 1990, Congress expressly codified the conflict preemption test formerly articulated by the regulations. The HMTUSA now expressly preempts any legal "requirement" of a State if compliance with the State requirement makes it impossible to comply with federal statutes or regulations, or if the State requirement, "as applied or enforced, is an obstacle to accomplishing and carrying out this chapter" or "a regulation prescribed under this chapter." 49 U.S.C. § 5125(a).

have consistently recognized, that test has extraordinary force in this context because Congress's central "purpose[] and objective[]" in passing the HMTA was precisely to achieve consistency and uniformity in the nationwide regulation of hazardous materials transportation. *See supra* at 7-8. And when passing the HMTUSA, Congress expressly found that "consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable," and that State requirements which duplicate or add to federal standards create "the potential for unreasonable hazards in other jurisdictions" by "confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements." Pub. L. No. 101-615, § 2, 104 Stat. at 3245.

The United States Courts of Appeals have considered several State requirements imposing additional duties on shippers of hazardous materials, and have consistently held that such requirements are preempted by federal law.[8] The Ninth Circuit in *Southern Pacific Transportation Co. v. Public Service Commission*, 909 F.2d 352 (9th Cir. 1990), held that Nevada regulations requiring hazardous materials carriers to obtain separate State permits were preempted by the DOT regulations. Although it would have been possible to comply with both the State and federal standards, the Ninth Circuit emphasized that DOT had already promulgated numerous requirements related to loading, unloading and shipping hazardous materials—and that the State permit regulations "create[d] a separate

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[8] DOT has similarly found several State requirements to be obstacles to the goals of HMTA, and therefore preempted. *See, e.g.*, Inconsistency Ruling No. IR-22, 52 Fed. Reg. 46,574 (Dec. 8, 1987); Inconsistency Ruling No. IR-19, 52 Fed. Reg. 24,404 (June 30, 1987); Inconsistency Ruling No. IR-20, 52 Fed. Reg. 24,396 (June 30, 1987); *see also* Notice No. 89-3, 54 Fed. Reg. 26,710 (June 23, 1989) (cataloging the inconsistency preemption rulings DOT issued during the time of this incident).

regulatory regime for these activities, fostering confusion and frustrating Congress' goal of developing a uniform national scheme of regulation." *Id.* at 358.

In *Chlorine Institute v. California Highway Patrol*, 29 F.3d 495 (9th Cir. 1994), the Ninth Circuit considered a California Highway Patrol regulation requiring separate escort vehicles for the transport of chlorine and oleum by highway within California. The Ninth Circuit again emphasized that "state regulations pertaining to an area already regulated under the [regulations] pose an obstacle to the goal of uniform national standards for the transportation of hazardous materials," and held that CHP's regulations were preempted. 29 F.3d at 497.

And in *Colorado Public Utilities Commission v. Harmon*, 951 F.2d 1571 (10th Cir. 1991), the Tenth Circuit considered a variety of requirements that Colorado attempted to impose on persons transporting radioactive materials in that State. Colorado required, for example, that carriers obtain a State permit, provide the State with advance notice of shipment, and carry an inspection report in the vehicle. The Tenth Circuit noted that "enactment of separate information and documentation requirements in even a few of the thousands of local jurisdictions across the country would lead to the multiplicitous regulations Congress sought to avoid." 951 F.2d at 1582. "Because Colorado's regulation forces transporters of hazardous materials to generate and maintain additional documentation and information, we conclude that it is likely to confound shippers and carriers and to increase the potential for hazards in other jurisdictions." *Id.* The court held that "Colorado's regulations simply do not further the federal purpose of promoting safety through uniformity," and are therefore preempted. *Id.*

2. The State Law Requirements Imposed By Louisiana Are Inconsistent With The Structure And Objectives Of The HMTA And The DOT Regulations.

The substantive tort duties imposed by Louisiana in this case are inconsistent with the federal regulations, and far more disruptive to the uniformity and coherence of federal law than the modest documentation requirements invalidated in the cases described above.

DOT's "functional" test for determining the shipper or "offer[or]" sensibly assigns regulatory compliance obligations (and legal responsibility for compliance) to the party who actually performs the functions. 55 Fed. Reg. 6758 (citing Interpretation No. 88-1-RSPA). DOT also recognizes that commercial practice and private contractual arrangements can determine which party is responsible for compliance with particular hazardous materials regulations. *Id.*

The Louisiana court of appeal did not apply DOT's analysis or anything like it. If it had, it would have been obliged to conclude that Mitsui, not Polysar, "offer[ed]" the tank car in question for transportation in commerce. Considering the factors identified by DOT in its formal interpretation: (1) Mitsui and GATX actually performed every one of the functional obligations assigned to the shipper or offeror under the regulations; (2) the contractual arrangements assigned the duties to Mitsui and there was no contrary, credible evidence below; and (3) evidence introduced at trial established a twelve-year past practice of assigning these compliance duties to Mitsui. Mitsui (and, for certain functions, its agent GATX) was clearly the "functional" offeror under DOT's approach.

The Louisiana court did not even purport to hold that Polysar performed regulated functions as recognized by DOT under the regulations. Instead, the court held that

Louisiana tort law imposes certain duties on the ultimate purchaser and title owner of hazardous cargo (duties ostensibly based on, but in fact inconsistent with, the federal regulations), and that those duties are—again, as a matter of Louisiana tort law—completely non-delegable by contract or otherwise. The court also pointed generically to the commercial realities that Polysar pays to have its product shipped, would have been aware that its products would be shipped over established rail lines, and could conceivably have specified by contract the specific tank cars that Mitsui should use. Pet. App. 47a. None of these facts distinguish Polysar from every other purchaser/owner of a hazardous materials cargo, and none are relevant to DOT's functional shipper analysis.[9] In the end, the Louisiana court imposed liability on Polysar solely because Polysar was the title owner of the cargo in question. That rule cannot be reconciled with DOT's regulations and interpretive guidance, which make it clear that ownership alone does not determine responsibility for regulatory compliance.

To put the point another way, Louisiana's dictate that these compliance responsibilities are absolutely non-delegable as a matter of State law, and therefore that "whether Mitsui is an independent contractor to Polysar is of no moment," is flatly in conflict with DOT's regulations and guidance. DOT has made it perfectly clear that these compliance responsibilities can, as a matter of *federal* law, be shifted away from the title owner to a qualified independent contractor either by private contract or settled trade practice. *See* 55 Fed. Reg. 6758. Louisiana's rule placing these obligations on Polysar and every other

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[9] If the purchaser *in fact* intervened by contract or otherwise in such matters as tank car selection, then it might to that extent be considered the functional shipper under DOT's test; but the unexercised theoretical possibility of such intervention does not transform a passive purchaser into the functional shipper.

innocent cargo owner is directly in disregard of and ignores DOT's clear mandates on this matter.

Only this Court can resolve this conflict, and its intervention is urgently needed. The practical consequence of the Louisiana court's decision is that purchasers of hazardous materials, wherever located in the United States, must send a representative to Louisiana, in person, to supervise and second-guess the actions of independent professional hazardous materials transport companies operating in (or simply moving through) that State.

As DOT, the federal regulations, and the entire chemical industry[10] recognize, that regime is unworkable, unsafe, and simply makes no sense. Companies like Polysar have always hired qualified independent contractors like Mitsui and GATX to perform specialized tasks such as operating seaports and terminaling facilities. Nonetheless, Polysar was held liable in this case because it failed to send one of its employees to Louisiana, to question Mitsui's judgment about such matters as tank car inspections and how best to unload butadiene from a ship at Mitsui's own port facility. Notably, however, the Louisiana court offered no guidance

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[10] The American Chemistry Council ("Council") filed an *amicus curiae* brief before the Supreme Court of Louisiana in this case. The Council represents more than 90% of our Nation's productive capacity of basic industrial chemicals, and associates closely with and monitors DOT action with respect to all aspects germane to the transport of hazardous materials. The Council represented to the court that it had reviewed all pertinent DOT decisions, interpretations and enforcement actions relative to offeror status and stated that it "is unaware of any evidence or legal precedent in the record that would support the Fourth Circuit's interpretation that Polysar 'offered' hazardous material for transportation within the meaning of DOT regulations." The Council further represented that "after diligent inquiry," it "has been unable to uncover a single situation where DOT enforcement officials have even attempted to enforce their regulations in a manner consistent with the Fourth Circuit interpretation." Brief on Behalf of American Chemistry Council Amicus Curiae in Support of Writ Application at 5 (Sept. 12, 2001).

about how to resolve a dispute if Polysar and Mitsui *disagreed* about how Mitsui should best fulfill its regulatory compliance obligations.

The logic of the Louisiana court's decision suggests that Polysar was similarly not entitled to trust CSX Railroad's compliance with *its* responsibilities under the HMTA and federal regulations either, and should have had a Polysar employee riding shotgun on the train all the way to Tennessee. Presumably Polysar was also obligated to send one of its employees along on the ship which arrived from Portugal and unloaded the butadiene at a Louisiana port, to ensure that the crew properly complied with their duties under the HMTA and DOT regulations—or any other statutes that impose duties which affect "public safety" and therefore now cannot be delegated by cargo owners as a matter of Louisiana State law.

With respect, this simply cannot be the law. At best, Louisiana's rule is a prescription for confusion, delay, and inefficient duplication at our Nation's ports, rail terminals, and other trans-shipment hubs. That alone would suffice to establish preemption under the standards laid out in the HMTA, its implementing regulations, and the cases cited above. The disruption, disuniformity and inefficiency[11] created by Louisiana's rule vastly exceeds that associated with the relatively modest documentation requirements invalidated in cases like *Southern Pacific Transportation Co.* and *Colorado Public Utilities Commission.*

At worst, moreover, Louisiana's rule threatens to significantly increase the risk of major industrial accidents.

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[11] In the HMTUSA, Congress expressly found that "the movement of hazardous materials in commerce is necessary and desirable to maintain economic vitality and meet consumer demands," and that the purpose of the statute was therefore "reasonable, adequate and *cost-effective* protection from the risk posed by the transportation of hazardous materials." Pub. L. No. 101-615, § 2, 104 Stat. at 3245 (emphasis added); *see also Colo. Pub. Utils. Comm'n*, 951 F.2d at 1582 n.11.

First, that rule will encourage often novice cargo owners to interfere with and second-guess the judgment of specialist experts in the field of hazardous materials transport. DOT's regulations permit the delegation of "offer[or]" duties by contract because DOT sensibly encourages cargo owners to contract with experts in the field of regulatory compliance to fulfill those duties. Notice No. 90-2, 55 Fed. Reg. at 6760 (citing Interpretation No. 88-1-RSPA); *see also Hawkins v. Evans Cooperage Co.*, 766 F.2d 904, 908 (5th Cir. 1985) (manufacturer entitled to rely on expertise of its independent contractor, a common carrier with 20 years of experience in shipping hazardous substances). Louisiana's rule prevents such delegation, and provides no mechanism for resolving conflicts between the cargo owner and the actual functional shipper—which remains responsible for regulatory compliance as a matter of *federal* law.

Second, DOT has recognized that clarity in the designation of responsibility for compliance obligations is essential to safe handling of hazardous materials, since human error is the single greatest contributing factor in hazardous materials incidents. DOT 2000 Report at xiii. In fact, DOT data shows that roughly 80% of the hazardous materials incidents are attributed to human error. *Id.* The Louisiana rule foments confusion and requires duplication at this most sensitive level. DOT has consistently determined that State regulations intended to be more stringent or duplicative of the federal regulatory requirements are preempted. *See* Notice No. 89-3, 54 Fed. Reg. 26,710 (June 23, 1989). "[D]uplication in a regulatory scheme where the Federal presence is so pervasive can only result in making compliance with [the regulations] less likely, with an accompanying decrease in overall public safety." Inconsistency Ruling No. IR-5, 47 Fed. Reg. 51,991, 51,994 (Nov. 18, 1982), *quoted in Mo. Pac. R.R. v. R.R. Comm'n*, 671 F. Supp. 466, 481 (W.D. Tex. 1987), *aff'd on other*

grounds, 850 F.2d 264 (5th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989).

Third, Congress and DOT have repeatedly recognized that delay itself poses serious safety risks—for the obvious reason that the odds of an accident increase the longer that hazardous materials are in transit. *See Colo. Pub. Utils. Comm'n*, 951 F.2d at 1580-81. As DOT has explained:

> The manifest purpose of the HMTA and the Hazard Materials Regulations is safety in the transportation of hazardous materials. Delay in such transportation is incongruous with safe transportation. Given that the materials are hazardous and that their transport is not risk free, it is an important safety aspect of the transportation that the time between loading and unloading be minimized.

Inconsistency Ruling No. IR-2, 44 Fed. Reg. 75,566, 75,571 (Dec. 20, 1979), *quoted in Mo. Pac.*, 671 F. Supp. at 480; *see also* Inconsistency Ruling No. IR-16, 50 Fed. Reg. 20,872, 20,879 (May 20, 1985) ("[A]n important aspect of transportation safety is the minimization of time in transit. This objective has been incorporated in the HMR."), *quoted in Mo. Pac.*, 671 F. Supp. at 480. Several courts have held that requirements which will cause further delay in the transport of hazardous materials are preempted for that reason. *See, e.g., Jersey Cent. Power & Light*, 772 F.2d 1103, 1113 (3d Cir. 1985); *Nat'l Tank Truck Carriers, Inc. v. Burke*, 535 F. Supp. 509, 515 (D.R.I. 1982), *aff'd*, 698 F.2d 559 (1st Cir. 1983); *Mo. Pac*, 671 F. Supp. at 480-81.

Even a small disruption of DOT's carefully crafted statutory and regulatory scheme governing hazardous materials transportation could result in a catastrophic accident. There are approximately 800,000 hazardous materials shipments every day in the United States. DOT 2000 Report at i, v. DOT strives for zero tolerance in the handling of hazardous material, and estimates that 99.996%

of hazardous shipments by rail currently reach their final destination without incident.[12] *Id.* at v. In this area, one serious incident is one too many. There was testimony in this case that this single tank car, if it had exploded, could have destroyed several city blocks. Pet. App. 14a. The confusion, disruption and delay introduced by this decision are simply incompatible with Congress's goals of uniformity and safe transportation of these commodities.

Although the rule adopted in this case would be preempted by federal law if promulgated by any State, the fact that it was imposed by Louisiana creates unique risks to the national transportation system and general economy. Louisiana is a major transportation hub, particularly for the chemicals industry. The federal database for monitoring commodity flow divides the country into nine regions. According to the 1986 OTA Report, more than 25% of the hazardous materials transport flow originates in the West South Central Region, while more than 20% terminates there as well. OTA Report at 53. This region is comprised only of four states: Louisiana, Texas, Oklahoma and Arkansas. *Id.* at 47. Louisiana is home to two of the four largest railroad junctions (New Orleans and Shreveport) through which the flow of hazardous materials occurs in this country. *Id.* at 53. New Orleans, the city in which this case arose, is also home to the world's busiest port complex.[13] The Port of New Orleans is America's most intermodal port serviced by 6 of the 8 Class I railroads, 50 ocean carriers, 16 barge lines and 75 truck lines. The port is on the world's busiest waterway with more than 6,000 ocean vessels annually moving through New Orleans. New Orleans'

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[12] This data is published by the Association of American Railroads. *Railroad Tank Cars: The Safe Way to Ship Hazardous Materials, available at* http://www.aar.org/ViewContent.asp?Content_ID=405.

[13] Data regarding the Port of New Orleans is published at The Port of New Orleans web site, *available at* http://www.portno.com/facts.htm.

strategic location at the mouth of the Mississippi River and on the Gulf of Mexico makes Louisiana the gateway for the flow of products to and from the growth areas of our country—namely the southeast and the southwest. In addition, Louisiana has prominence as one of the leading producers of chemicals in our country. Against that backdrop, correcting the Louisiana court's error in this case is a matter of urgent national importance.

II. LOUISIANA'S NON-DELEGATION RULE VIOLATES THE COMMERCE CLAUSE.

For many of the same reasons that it creates an obstacle to fulfillment of the goals of the HMTA and the DOT regulations, the rule of law recognized by Louisiana in this case also effects an unconstitutional interference with the flow of interstate commerce. *See* U.S. Const. art. I, § 8, cl. 3.

A. State Actions That Impose Excessive Burdens on Interstate Commerce Violate the Commerce Clause.

This Court has long recognized that the Commerce Clause "not only grant[s] Congress express authority to override restrictive and conflicting commercial regulations adopted by the States," but also serves as a "limitation upon the power of the States." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571-72 (1997) (citations omitted). Where a State law[14] does not directly regulate or discriminate against interstate commerce, but nonetheless adversely affects interstate commerce, this Court employs a deferential "balancing test." A law will be invalidated when "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). "[T]he

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[14] This Court has recognized in the dormant Commerce Clause context that "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996).

practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). This Court has also invalidated State laws under the dormant Commerce Clause (even though non-discriminatory to out-of-state interests), where such laws undermined a compelling need for national uniformity in regulation. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 n.12 (1997) (collecting cases).

In *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), for example, this Court invalidated an Arizona law limiting the length of trains that could be operated in that State. This Court acknowledged that Arizona justified the law by reference to local public safety concerns, but held that it was nonetheless invalid because it imposed an excessive burden on interstate commerce. This Court emphasized that varying State regulation of train lengths would "require[] interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state." 325 U.S. at 773. "The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state." *Id.* Given that extraterritorial "practical effect," this Court held that "[t]he serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent." *Id.* at 775. This Court also critically evaluated the safety justifications advanced by Arizona, and concluded that they were unpersuasive in light of various unintended *negative* consequences to public safety (relating,

for example, to the operation of shorter but more numerous trains). *Id.* at 779.

Similarly, in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), this Court considered an Illinois statute which required all trucks on Illinois highways to install an unusual style of mud flap. Illinois contended that these flaps reduced debris thrown up into the path of other vehicles. This Court concluded, however, that the safety evidence was "far too inconclusive" to justify the burden imposed on interstate commerce. 359 U.S. at 530. As in *Southern Pacific Co.*, this Court emphasized that Illinois' unique rule would be costly and disruptive for interstate carriers that had the simpler, straight mud flaps widely used in (and in at least one case *required by*) other States. As a consequence, the Illinois law could "mak[e] it necessary, say, for an interstate carrier to shift its cargo to differently designed vehicles once another state line was reached." *Id.* at 526. That problem suggested a strong "'need for national uniformity in the regulations for interstate travel.'" *Id.* at 527 (quoting *Morgan v. Va.*, 328 U.S. 373, 386 (1946)) (invalidating State statute which required reseating of passengers on an interstate bus to comply with local segregation law).

B. Louisiana's Non-Delegation Rule Imposes An Excessive Burden On Interstate Commerce.

The rule adopted by the court of appeal in this case imposes a substantial and unjustifiable burden on interstate commerce of precisely the sort invalidated in *Bibb* and *Southern Pacific Co.*

Purchasers of hazardous materials nationwide regularly contract with specialized transport companies for the delivery of hazardous materials. Consistent with the DOT regulations and the established common law governing independent contractors, purchasers rely on these independent transportation experts to take all necessary

steps to comply with the specific regulatory duties (and any derivative tort duties) associated with the shipment of those materials. That is how business generally is, and has been, done across the United States.

The Louisiana tort rule adopted in this case imposes an entirely different and inconsistent legal regime on purchasers of hazardous materials, wherever located, to the extent that the product they have ordered ever travels through Louisiana. As soon as the ordered materials cross the Louisiana State line, the rule adopted here requires every remote purchaser (or at least every purchaser that has acquired title to the goods) to assume direct personal control of and responsibility for compliance with hazardous materials packaging and inspection requirements—and to maintain that control and responsibility until the cargo again crosses the State line out of Louisiana. Cargo owners from every State will be required to crisscross the country in a fruitless effort to duplicate regulatory functions that had been properly assigned to experts.[15] Given that there are approximately 800,000 shipments of hazardous material daily, a large proportion of which pass through Louisiana, the resources or trained personnel to comply with such absurd requirements simply do not exist.

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15 A sampling of the probable scenarios: (1) a Florida company purchasing hazardous material from Texas will be required to travel to Texas to inspect the rail cars and loading procedures since the product almost certainly is to traverse Louisiana; (2) a Virginia corporation will be required to send a representative to Louisiana to duplicate HMR duties in the event that it purchases a chemical from a Louisiana company; (3) a Louisiana company purchasing hazardous material from a Michigan producer will be required to travel to Michigan to duplicate compliance responsibility. Terminaling of the product in Tennessee or Illinois or any other state between Michigan and Louisiana will require inspection by a representative of the purchaser. In addition, what is characterized by DOT as residue shipments (product remaining in the heel of a tank car *after* delivery to the purchaser) likewise will require duplicative oversight babysitting by representatives of innocent purchaser until the cars have returned to their point of origin.

The rule adopted by Louisiana in this case also has the same practical tendency to dictate commercial behavior *outside* the State that this Court identified as fatal to the laws invalidated in *Bibb* and *Southern Pacific Co.*. Remote purchasers of hazardous materials that will be forced to assume responsibility for regulatory compliance when their orders cross Louisiana will, as a practical matter, eventually assume responsibility for such compliance at the outset of and throughout the shipment. For that reason, the Louisiana rule is practically, if perhaps not formally, extraterritorial in application—making the need for uniform national regulation in this area plainly apparent. Indeed, that was precisely the insight that motivated Congress to enact the HMTA.

Absent federally enforced uniformity, even nationwide acquiescence to Louisiana's novel dictates may not ultimately be a viable alternative for interstate shippers of hazardous materials. This Court has recognized that it is appropriate to consider how a State rule "may interact with the legitimate regulatory regimes of other States," and "what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336. If Louisiana is entitled to specify that these duties may not be delegated by cargo owners, then other States could presumably hold that they may not be delegated away from the entities actually handling and transporting hazardous materials. (Indeed, that rule would be both more sensible and more consistent with the federal scheme). But such action would make uniform compliance with the law across a multi-state route essentially impossible.

CONCLUSION

For the reasons stated, we respectfully submit that the questions presented by this petition warrant certiorari, and that this case would be an appropriate candidate for summary reversal. If this Court is uncertain whether

certiorari is warranted, however, petitioner believes that it would be appropriate to call for the views of the Solicitor General.

Respectfully submitted,

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